79 Box 30 - JGR/Judges (1) – Roberts, John G.: Files SERIES I: Subject File

1. debate re ~~Exceptions~~ clause
2. reaction to S. Ct. decisions
3. AG view: sep of powers, accepting would void core protections: ensure supremacy + uniformity of fed law.
4. dif in lower feds, + remedies (Rodino letter) (same date).
5. scholarly debate, but <u>wisdom</u> prob ⇒ other routes.

Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*

Gerald Gunther**

Recent congressional consideration of jurisdictional curbs on the federal courts has spurred renewed and widespread interest in important and unsettled constitutional and policy issues. In 1981 and 1982 alone, thirty jurisdiction-stripping bills were introduced in Congress,[1] some eliciting extensive committee hearings.[2] Most of the proposals stem from dissatisfaction with Supreme Court decisions, especially those dealing with the controversial "social issues" of school prayer,

---

* This essay is a revised version of a background paper prepared for the Annual Chief Justice Earl Warren Conference of the Roscoe Pound American Trial Lawyers Foundation, held in Charlottesville, Virginia, in June, 1983.

I am grateful to the Foundation for permission to publish this revised version of my paper. The earlier version has been printed in ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, FINAL REPORT OF THE 1983 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, THE COURTS: SEPARATION OF POWERS (1983).

** A.B. 1949, Brooklyn College; M.A. 1950, Columbia University; LL.B. 1953, Harvard Law School. William Nelson Cromwell Professor of Law, Stanford Law School.

1. *See* Baucus & Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress,* 27 VILL. L. REV. 988, 992 n.18 (1982) (collecting proposals).

Although congressional attention to jurisdictional curbs waned in 1983, the lull may well be coming to an end. Thus, Senator Jesse Helms warned on March 20, 1984, the day the Reagan Administration's school prayer constitutional amendment was blocked in the Senate, that he would renew his efforts to restrict federal court jurisdiction regarding school prayer, abortion, and busing. He stated: "[T]here is more than one way to skin a cat, and there is more than one way for Congress to provide a check on arrogant Supreme Court Justices who routinely distort the Constitution to suit their own notions of public policy." 130 CONG. REC. S2901 (daily ed. Mar. 20, 1984) (statement of Sen. Helms).

2. The most comprehensive hearings in the 97th Congress were *Constitutional Restraints upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981) [hereinafter cited as *Constitutional Restraints upon the Judiciary*]. For a sampling of additional hearings in recent years, see *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981); *Court-Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1743, and S. 1760 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981) [hereinafter cited as *Court-Ordered School Busing*]; *The 14th Amendment and School Busing: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981); *Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearings on*

abortion, and busing. The targets of the bills have varied: Some seek only to curb the Supreme Court's appellate jurisdiction in specified classes of cases; some focus solely on the jurisdiction and remedial powers of the lower federal courts; and some apply to all federal courts. The issues posed by these controversial proposals are not new. Rather, the questions of power and policy they raise have been staples of our constitutional history. Yet the issues remain largely unresolved, as the enormous literature on the problems attests.[3]

I. SOME PRELIMINARY REMARKS

Jurisdiction-curbing proposals have surfaced in Congress in virtually every period of controversial federal court decisions. In the Marshall Court years, especially during the 1820's, those who perceived a tendency towards centralization in the Court's decisions proposed repealing section 25 of the 1789 Judiciary Act,[4] which authorized

S. 450 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (1980).

Similar proposals have been introduced in the 98th Congress (1983–84). *See, e.g.*, S. 785, 98th Cong., 1st Sess., 129 CONG. REC. S2702 (daily ed. Mar. 11, 1983) (introduced by Senator Helms). This bill expanded Senator Helms' earlier proposals eliminating federal court jurisdiction over cases relating to "voluntary prayers"—e.g., the Helms Amendment to S. 210, 96th Cong., 1st Sess., 125 CONG. REC. 7577 (1979)—to cover "Bible reading" and "religious meetings." It is not yet clear whether these proposals will attract as much attention as those of recent years.

3. For a useful bibliography of the scholarly literature as of 1981, see William Van Alstyne's "Bibliographical Note" in *Constitutional Restraints upon the Judiciary, supra* note 2, at 135 (1981). For the most useful discussions since then, see *Proceedings of the Forty-Third Annual Judicial Conference of the District of Columbia Circuit* (May 1982), 96 F.R.D. 245, 254-90 (1982) (contributions by Randall Rader, David Brink, Jules Gerard, Laurence Tribe and William Van Alstyne) [hereinafter cited as *Proceedings*]; Brilmayer & Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819 (1983); *Limiting Federal Court Jurisdiction*, 65 JUDICATURE 177 (1981); Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U.L. REV. 497 (1983); *The Politics of Justice: A Symposium*, 21 JUDGES' J. 3 (1982); Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982); Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385 (1983); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); *Symposium: Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893 (1982) (contributions by Martin Redish, Leonard Ratner, Charles Rice, Max Baucus & Kenneth Kay, James McClellan and Paul Bator); Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); American Enterprise Institute for Public Policy Research, Conference on Judicial Power in the United States (1981) (unpublished transcript).

4. Ch. 20, § 25, 1 Stat. 85 (1789) (current version at 28 U.S.C. § 1257 (1982)).

Supreme Court review of certain state court judgments.[5] Jurisdiction-curbing proposals have been even more prevalent in this century. The best remembered ones before those of recent vintage are no doubt those of the late 1950's, made in response to Supreme Court decisions allegedly favoring "subversives" and endangering national security. The Jenner-Butler proposals, for example, provoked extensive debate in 1957 and 1958.[6] But the 1950's bills failed, a fate that has befallen all such efforts directed at the Supreme Court—with one notable exception in the post-Civil War years, an exception that I will consider later in this essay.[7]

The problems raised by the recent jurisdiction-curbing proposals, then, are not novel. Nor have the issues been authoritatively resolved (although I will suggest that some questions are more readily answerable than others). This lack of resolution stems in part from the fact that, because most of the jurisdiction-stripping devices have not been enacted, the Supreme Court has had only limited opportunity to address the issues. Yet many of the proposals have engendered widespread debate, and one might expect that the ultimate tribunal—that of academics (who, unlike the Justices, often claim infallibility even though they lack finality[8])—would have reached a consensus after more than a century and a half of scrutiny. But I can assure you that there is no such consensus, despite extensive commentary over the last several decades, particularly during the last four years.[9]

---

5. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 46 (10th ed. 1980); Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act* (pts. 1 & 2), 47 AM. L. REV. 1, 161 (1913).

For example, in 1827, a year before he became a public advocate of Nullification, John C. Calhoun urged a distinguished Senator from Virginia to press for repeal of section 25. "[T]his negative [the power of a State to block allegedly unconstitutional federal action] would in truth exist," he argued, "were it not for a provision in a single act of Congress," section 25 of the Judiciary Act of 1789. Letter from John C. Calhoun to Littleton W. Tazewell (Aug. 25, 1827) (Calhoun Papers, Library of Congress), *quoted in* G. GUNTHER, *supra,* at 46 n.†).

6. The bill would have eliminated federal appellate jurisdiction in cases involving, for example, the federal employees' security program, state subversive legislation, and state bar admissions. *See generally* Elliott, *Court-Curbing Proposals in Congress,* 33 NOTRE DAME LAW. 597 (1958). Ironically, Senator Butler of Maryland, the cosponsor of that attack on the Warren Court, had been the sponsor only a few years earlier of a constitutional amendment to bar congressional tampering with the Court's appellate jurisdiction in all constitutional cases. G. GUNTHER, *supra* note 5, at 55.

7. *See* notes 40–47 *infra* and accompanying text (discussing *Ex parte McCardle*).

8. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final.").

9. The recent writing is indeed "choking on redundancy," as an eloquent scholar put it to me recently. Letter from William Van Alstyne to Gerald Gunther (Feb. 28, 1983).

But the risk of adding to the redundancy is clearly offset, I believe, by the pervasiveness and significance of the issues.

I will concentrate on the central issues rather than on the details of specific proposals—proposals that frequently seem flawed in particulars even to those who endorse broad congressional authority over federal court jurisdiction.[10] The recurrent issues can be stated in general terms as follows: What are the constitutional limits on congressional authority to curb the Supreme Court's appellate jurisdiction? What are the constitutional limits on congressional authority to restrict the jurisdiction or remedial capacity of the lower federal courts? And what are the relevant criteria in assessing the wisdom and efficacy of jurisdiction-curbing proposals?

Let me conclude these introductory remarks with a few warnings that seem to me especially appropriate after reexamining the literature. First, as with many areas, the complexity of these problems is directly proportional to the length of time one dwells on them. Thus, even if one finds very few constraints on congressional power in the Judiciary article of the Constitution, article III (and I am one of those who does not find many such constraints), potential constitutional limits loom larger when one turns to the impact of other constitutional limitations on legislative authority, such as the Bill of Rights. Second, in this area as in others, it is useful—and often difficult—to bear in mind the distinction between constitutionality and wisdom. A good many commentators (including myself) take a rather broad view of congressional power over the jurisdiction of federal courts in terms of sheer legal authority. Very few (and I am not one of these) support jurisdiction-stripping measures as a matter of desirability and effectiveness. The oft-heard admonition about the distinction between constitutionality and wisdom bears special emphasis in this context, for some of the scholarly commentary (and many of the comments in the media and in the political arena) tend to obscure the distinction; too often perceptions of what the Constitution authorizes tend to be confused with what sound constitutional statesmanship admonishes.

Let me turn now to some of the elements of the problems at hand. I will begin with the constitutional framework. While that is not always the starting point of constitutional discussion among academics or judges, in this area, happily in my view, most analyses do rec-

10. *See, e.g., Constitutional Restraints upon the Judiciary, supra* note 2, at 35, 50 (statement of Bator), 99–100, 132–35 (statement of Van Alstyne); Bator, *Congressional Power Over the Jurisdiction of the Federal Courts,* 27 VILL. L. REV. 1030, 1037–41 (1982).

ognize that the constitutional text and history have something to contribute.

II. The Constitutional Framework

The constitutional starting point lies in the relatively few words of article III, the Judiciary article. The opening sentence of the first section of that article states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[11] The second part of that sentence is relied upon heavily by those who assert that there exists a broad congressional authority to curtail the jurisdiction of the lower federal courts: since "inferior Courts" are not mandated by the Constitution and since Congress has explicit discretion whether or not to "ordain and establish" them, the argument goes, Congress presumptively may give or take away whatever portions of the "judicial Power" it wishes.[12]

Section 2 of the Judiciary article begins by delineating the types of "Cases" and "Controversies" to which the "judicial Power" extends—for example, cases "arising under" the Constitution and federal laws and treaties, and controversies between "Citizens of different States."[13] That section then specifies the relatively few types of cases within the "judicial Power" in which "the supreme Court shall have original Jurisdiction"[14]—an original jurisdiction to which Congress cannot add additional varieties of cases.[15] The sentence that follows this constitutional delineation of original jurisdiction is the one at the center of the textual controversy about congressional authority over the Court's appellate jurisdiction. It states: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[16] The congressional authority to make "Exceptions" pro-

11. U.S. Const. art. III, § 1.

12. The rest of section 1 provides the central guarantees of the independence of federal judges: they hold office "during good Behaviour," and their compensation "shall not be diminished during their Continuance in Office." *Id.* Some ingenious limits on congressional power have been drawn from these judicial independence guarantees by Professor Sager. *See* Sager, *supra* note 3, at 61–68. These limits are discussed at text accompanying notes 85–87 *infra*.

13. U.S. Const. art. III, § 2.

14. Original jurisdiction exists over cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party." *Id.*

15. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–75 (1803).

16. U.S. Const. art. III, § 2.

vides the central textual foundation for those claiming a broad congressional power over appellate jurisdiction.

These article III provisions have been the main battleground for the debate about congressional authority over federal court jurisdiction. But they are not the only potentially relevant constitutional provisions. Other provisions limit all congressional power, with respect to jurisdiction as with other subjects. Congress is prohibited, for example, from enacting Bills of Attainder and suspending the Writ of Habeas Corpus in most circumstances.[17] Still more important is the Bill of Rights, including the fifth amendment and its due process clause—a clause which the Court in recent decades has interpreted to make the equal protection guarantee of the fourteenth amendment applicable to the federal government.[18] And with the explosive expansion of equal protection doctrine in recent decades, a growing number of arguments against congressional control of federal court jurisdiction, not surprisingly, have relied on variants of modern equal protection themes.

With this constitutional road map in hand, let us try to make our way through the embattled terrain of the contending positions. Does Congress have power, for example, to strip the Supreme Court of portions of its present jurisdiction by barring review of entire subjects or classes of cases? May Congress, for example, bar review of "any case arising out of any State statute [that] relates to voluntary prayers in public schools and public buildings"[19]—a provision that Senator Helms advocated in recent years and that had gained Senate approval as long ago as the spring of 1979, even before consideration of jurisdiction-stripping devices became widespread during the 1980's? In examining the asserted limits on congressional power to enact such provisions, I think it useful to resort to the now commonplace distinction between "internal" and "external" restraints on congressional authority: the "internal" restraints are those arguably implied by article III itself; the "external" ones are those inferable from other provisions of the Constitution.

17. *Id.* art. I, § 9.

18. This interpretation originated in large part in Bolling v. Sharpe, 347 U.S. 497 (1954) (the D.C. school segregation case).

19. *See* G. GUNTHER, *supra* note 5, at 56–57 (discussing the Helms Amendment to S. 210, 96th Cong., 1st Sess., 125 CONG. REC. 7577 (1979)); *see also* S. 785, 98th Cong., 1st Sess., 129 CONG. REC. S2702 (daily ed. Mar. 11, 1983).

III. "INTERNAL" RESTRAINTS: LIMITS ON CONGRESSIONAL POWER ARGUABLY INHERENT IN ARTICLE III ITSELF

A. *Appellate Jurisdiction*

On its face, the exceptions clause of article III, section 2, seems to grant a quite unconfined power to Congress to withhold from the Court a large number of classes of cases potentially within its appellate jurisdiction. Moreover, those who would find substantial constitutional restraints on congressional power over Supreme Court appellate jurisdiction within article III itself face formidable obstacles in the historical congressional practice and in numerous statements by the Supreme Court. Nevertheless, there have been extensive academic efforts to articulate substantial internal limits on congressional authority.

Some opponents of broad congressional power have argued that the "exceptions" power extends only to appeals on questions of fact, not questions of law.[20] This reading seems at least contrary to the punctuation of the relevant phrase, if one may venture so pedantic an interpretation of the Constitution in this day and age. Supporters of this argument for a narrow view of congressional power have also relied on the fact that much of the debate about the exceptions clause during the Constitutional Convention era reflected fears of excessive Supreme Court review of state court determinations of fact. But this "facts only" limitation enjoys very little academic support today. In the recent literature, it surfaces largely as an easy target for supporters of broad congressional authority.[21]

Far and away the most widely voiced modern argument for internal limitations is that the "exceptions" power of Congress cannot be exercised in a way that would interfere with the "essential" or "core" functions of the Supreme Court. The origin of the argument is traceable to a remark in the deservedly famous Socratic dialogue written by the late Henry Hart in 1953.[22] Hart suggested (with somewhat ambiguous import[23]) that the "exceptions" power cannot be used in a manner that "will destroy the essential role of the Supreme Court

20. *E.g.*, R. BERGER, CONGRESS V. THE SUPREME COURT 285–96 (1969); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962). For recent changes in Berger's position, see note 58 *infra*.

21. *E.g.*, Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 913–15 (1982).

22. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

23. *Constitutional Restraints upon the Judiciary*, *supra* note 2, at 101–02, 121–22 (statement of Van Alstyne).

in the constitutional plan."[24] The most insistent modern advocate of this type of limit is Leonard Ratner.[25] In Ratner's view, the "essential constitutional functions of the Court" are "to maintain the supremacy and uniformity of federal law."[26] A plenary congressional "exceptions" power, he insists, is "not consistent with the constitutional plan."[27]

Although much of the modern academic literature goes on at considerable length to explain why Ratner's thesis is unpersuasive,[28] he does not stand alone in advocating this "essential functions" limit. Recently, his position has been adopted in substance by a powerful ally outside of academia—William French Smith, the Reagan Administration's Attorney General. In May 1982, Attorney General Smith sent a lengthy letter to Senator Strom Thurmond, the Chairman of the Senate Judiciary Committee, in response to inquiries about the constitutionality of the portion of the Helms bill that would withdraw the Court's appellate jurisdiction over cases relating to "voluntary" prayers.[29] The Attorney General, while recognizing that "the question of the limits of Congress' authority under the Exceptions Clause is an extraordinarily difficult one,"[30] argued that Congress may not constitutionally "make 'exceptions' to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers."[31] Rather, "Congress can limit the Supreme Court's appellate jurisdiction only up to the point where it

24. Hart, *supra* note 22, at 1365.

25. *See, e.g., Constitutional Restraints upon the Judiciary, supra* note 2, at 13 (statement of Ratner); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court,* 109 U. PA. L. REV. 157 (1960); Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction,* 27 VILL L. REV. 929 (1982) [hereinafter cited as Ratner, *Majoritarian Constraints*].

26. Ratner, *Majoritarian Constraints, supra* note 25, at 957.

27. *Id.* In his most recent version of the argument, Ratner does not insist that "every constitutional case must be reviewed by the Court," "as long as some avenue remains open for ultimate resolution of persistent conflicts between the Constitution and state law or in constitutional interpretation by lower courts." *Id.* Ratner asserts that the exceptions clause would have ample scope if it were read to permit Congress merely "to check the Court by specifying procedures, expediting or retarding the flow of cases, eliminating review of diverse-citizenship cases, limiting review of less consequential cases, and inhibiting review of factual issues." *Id.*

28. *See, e.g., Constitutional Restraints upon the Judiciary, supra* note 2, at 54, 121–22 (statements of Van Alstyne and Bator); Bator, *supra* note 10, at 1038–41; Redish, *supra* note 21, at 906–13.

29. Letter from Attorney General William French Smith to Senator Strom Thurmond (May 6, 1982), *reprinted in* 128 CONG. REC. S4727–30 (daily ed. May 6, 1982).

30. *Id.* at S4730.

31. *Id.* at S4727.

impairs the Court's core functions in the constitutional scheme."[32]

What are the pros and cons of the widely debated "essential" or "core" functions position? Proponents of the thesis cannot readily (and do not) rely on the constitutional language: there is simply no "essential functions" limit on the face of the exceptions clause. They claim to find helpful language in some Supreme Court opinions, but they discount the far more numerous statements from the Court suggesting a very broad congressional authority by arguing that the Court has really never had to face a situation in which Congress sought to bar all access to the Court in an "essential" area. Proponents rely above all on historical expectations and structural considerations allegedly demonstrating that appellate review must be available to assure that the Court will be able to provide the "essential" uniformity and supremacy of important (especially constitutional) issues of federal law. Critics of the thesis question the legitimacy of importing the "essential functions" limit into the Constitution, emphasize the vague, slippery, open-ended nature of the limit, and challenge its various underpinnings at length.

The most concrete source of the arguments lies in statements made by the Supreme Court itself. The advocates of an "essential functions" limit can indeed point to various dicta endorsing the desirability of Court review to ensure the supremacy and uniformity of federal law. An early, extensive, and eloquent example is in Joseph Story's opinion for the Court in *Martin v. Hunter's Lessee,*[33] which sustained the constitutionality of section 25 of the 1789 Judiciary Act[34] against an attack from the highest court of Virginia. But, as I have argued elsewhere, Justice Story's statements are more plausibly read as exhortations regarding desirable policy than as expressions of constitutional commands, particularly in view of his own later decisions and his contemporaneous legislative lobbying activities advocating congressional extension of the Judiciary Act.[35] In any event, as critics such as William Van Alstyne have pointed out, the Court's sporadic paeans of praise to uniformity and supremacy seem far outweighed by its considerably more frequent expressions of deference to congressional delineations of appellate jurisdiction.[36]

Since the Supreme Court's inception, it has treated the congres-

32. *Id.* at S4728.

33. 14 U.S. (1 Wheat.) 304 (1816).

34. Ch. 20, § 25, 1 Stat. 85 (1789) (current version at 28 U.S.C. § 1257 (1982)).

35. G. GUNTHER, *supra* note 5, at 57–59.

36. *Constitutional Restraints upon the Judiciary, supra* note 2, at 114–17 (statement of Van Alstyne).

sional statutes "granting" appellate jurisdiction as exercises of the "exceptions" power. Chief Justice Marshall, for example, took this position as early as 1810, in *Durousseau v. United States.*[37] Indeed, the opinion merely reiterated the broad view he had taken of the congressional "exceptions" power as early as 1788, when he participated in the Virginia ratifying convention.[38] And those are not mere antiquarian statements: the Court has reiterated that theme over the years, essentially down to the present.[39]

None of these Court statements was made in contexts similar to those that gave rise to the modern congressional proposals to strip the Court of power to hear some types of cases, with one significant exception: *Ex parte McCardle.*[40] *McCardle,* decided in 1869, sustained a jurisdictional limit on the Court enacted by a Congress clearly worried that the Court would invalidate the post-Civil War Reconstruction Acts.[41] McCardle, a newspaper editor in military custody, appealed a lower federal court's denial of habeas corpus to the Supreme Court, relying on a recently enacted (1867) jurisdictional statute.[42] After the Court sustained its jurisdiction over the appeal and heard oral argument, Congress (in 1868) repealed those provisions of the 1867 law authorizing Supreme Court review.[43] All this took place in a period of great tension among the three branches. For example, when Congress withdrew appellate jurisdiction in 1868, impeachment proceedings against President Andrew Johnson were already under way. Nevertheless, the President vetoed the jurisdiction-stripping bill. With the Court standing by and withholding action in McCardle's case pending the outcome of the political battle, Congress overrode the veto. And when the Court finally decided the case a year later—after Chief Justice Chase had completed his duties as presiding officer in the Senate during the Johnson impeachment

37. 10 U.S. (6 Cranch) 307, 313–14 (1810).

38. *See* 3 ELLIOT'S DEBATES 560 (2d ed. 1863) (statement of Marshall), *quoted in Constitutional Restraints upon the Judiciary, supra* note 2, at 114–15 (statement of Van Alstyne).

39. *See, e.g.,* Palmore v. United States, 411 U.S. 389, 400–01 (1973); Flast v. Cohen, 392 U.S. 83, 109 (1968) (Douglas, J., concurring); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting on other issues); Yakus v. United States, 321 U.S. 414, 472–73 (1944) (Rutledge, J., dissenting on other issues); The "Francis Wright," 105 U.S. 381, 386 (1881); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–13 (1869); Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865); Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847).

40. 74 U.S. (7 Wall.) 506 (1869).

41. *E.g.,* Act of March 2, 1867, ch. 153, 14 Stat. 428, *as supplemented by* Act of March 23, 1867, ch. 6, 15 Stat. 2.

42. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (repealed 1868).

43. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

proceedings—it unanimously upheld the 1868 withdrawal of jurisdiction and dismissed the appeal.[44] The Court's opinion reiterated the message of *Durousseau* and later cases: the congressional delineations of the appellate jurisdiction of the Supreme Court were exercises of the "exceptions" power, "and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."[45]

Proponents of internal limits such as the "essential functions" thesis understandably strive to denigrate the significance of *McCardle.* Some would discount the case because of its historical context: considering the political tensions of the time, the argument goes, *McCardle* should be read as a response by an intimidated Court, a response not reliable for future guidance. But the case is on the books, and, more important, its basic theme of deference to congressional control is quite consistent with numerous Court dicta in calmer settings, before and since.[46] More substantial doubts about the precedential value of *McCardle* stem from the fact that the jurisdiction-stripping statute sustained there did not foreclose *all* appellate review: cases like McCardle's could still reach the Court through a route other than the repealed 1867 provision, as the Court knew.[47] But that is not an overpowering argument either, for the bulk of the *McCardle* opinion speaks very broadly and does not seem to turn on the availability of an alternative route of appellate review.

But the main support invoked by those who assert a broad "essential functions" limit on the "exceptions" power does not rest on such slender reeds. Instead the arguments rely most heavily on general expectations, historical and contemporary, about the Supreme Court's role—on the "constitutional plan" and its evolution. The main question raised by this kind of argument is whether it confuses the familiar with the necessary, the desirable with the constitutionally mandated. In recent decades, the Court certainly has enjoyed very broad statutory jurisdiction to review constitutional rulings by state and lower federal courts.[48] The central and expanding role of

44. For useful discussions of *McCardle* (including its historical context), see 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-88, at 433-514 (1971); Van Alstyne, *A Critical Guide to Ex Parte McCardle,* 15 ARIZ. L. REV. 229 (1973).

45. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1869) (loosely quoting Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810)).

46. *See* notes 37-39 *supra* and accompanying text.

47. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1869); *see also Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 103-06 (1869).

48. *See, e.g.,* 28 U.S.C. §§ 1254, 1257 (1976). Even today, however, because of the "ade-

the Court in our modern polity helps explain the recurrent outrage expressed in the media and in academia in response to proposed congressional assertions of power over jurisdiction. But is there sufficient basis, in history and in principle, for insistence upon substantial internal, article III restraints on congressional power?

The strongest basis for such restraints lies in expectations reflected in the debates at the Constitutional Convention.[49] The major point of controversy during the evolution of article III was whether the Constitution should mandate the establishment of lower federal courts. Nationalists insisted that lower federal courts were necessary to assure adequate enforcement of federal law; localists countered that state judges, compelled to apply federal law under the supremacy clause,[50] were adequate for the initial interpretation and enforcement of federal requirements, and that ultimate review by the Supreme Court would assure sufficient supremacy and uniformity. In one of the Convention's great compromises, article III emerged: the article mandated the creation of the Supreme Court, but left to the discretion of Congress the establishment of any "inferior" courts.[51]

Advocates of the "essential functions" limit on congressional power can draw some legitimate comfort from these debates, for an expectation of Supreme Court review of state court judgments was indeed widespread.[52] But is that expectation tantamount to a constitutional limitation on congressional authority over appellate jurisdiction? After all, the same Convention did insert the exceptions clause, the textual nub of the controversy. Even more damaging to the case for an unreachable, "essential" Court role of assuring supremacy and uniformity is congressional practice, beginning in the earliest period, when there was a considerable overlap among delegates to the Constitutional Convention and members of the First Congress. The Judiciary Act of 1789[53] did *not* grant to the Court all of the potential

---

quate and independent state grounds" doctrine, not all federal constitutional interpretations by state courts are reviewable by the Supreme Court. *See* G. GUNTHER, *supra* note 5, at 64–68; *cf.* Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977) (suggesting standards for state court interpretation of state constitutions in cases involving parallel state and federal provisions).

49. For a useful summary, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11–12 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; *see also* Bator, *supra* note 10, at 1038–39.

50. U.S. CONST. art. VI, cl. 2.

51. *Id.* art. III, § 1.

52. HART & WECHSLER, *supra* note 49, at 12.

53. Ch. 20, 1 Stat. 73 (1789).

article III appellate jurisdiction, even in constitutional cases, necessary to assure that the Supreme Court would be the ultimate provider of both supremacy and uniformity. Rather, section 25 of the Act,[54] dealing with review of state court decisions, was essentially a supremacy-assuring device; it was *not* primarily concerned with uniformity. Supreme Court review was available only when a state court denied a federal claim; when the state court sustained a federal claim, even when its reading of federal law differed from that of federal tribunals, review was unavailable. Such was the scheme of the jurisdictional statutes for more than a century, until 1914.[55] Proponents of the "essential functions" thesis have difficulty explaining the long life of the section 25 scheme. They counter that section 25 did, after all, assure supremacy.[56] But their thesis is that assurance of uniformity as well as supremacy is the "essential function" of the Court, and uniformity was conspicuously lacking from the congressionally devised and judicially implemented jurisdictional scheme until Congress chose to modify it early in this century.

The advocates of a narrow reading of the "exceptions" power then fall back to a broader ground: the alleged implications of the role of an independent judiciary in a system of separation of powers. A large part of Attorney General Smith's narrow reading of the "exceptions" power, for example, is based on just such premises. "Essential to the principle of separation of powers," he argues, "was the proposition that no one Branch of Government should have the power to eliminate the fundamental constitutional role of either of the other Branches."[57] But of course the constitutional scheme is one of checks and balances as well as separation. Article III does provide for an independent judiciary, but independence does not mean total insulation of the judicial branch any more than it does for the other branches. No one denies, for example, that the political branches govern the selection of personnel for the Bench, a selection process that often has a profound impact on the course of decisions. And

54. Ch. 20, § 25, 1 Stat. 85 (1789) (current version at 28 U.S.C. § 1257 (1982)).

55. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (current version at 28 U.S.C. § 1257(3) (1976)). I cannot resist adding, as someone who has had occasion to read the quite voluminous correspondence of the members of the Marshall Court, that Justices Marshall and Story were quite concerned during the 1820's and 1830's about the widespread proposals to repeal section 25, *see* Warren, *supra* note 5, but that neither they nor their colleagues ever suggested that such a repeal would be unconstitutional (though they feared that it would be disastrous to the Court and the nation).

56. *See, e.g.*, Ratner, *Majoritarian Constraints*, *supra* note 25, at 953.

57. Letter from Attorney General William French Smith to Senator Strom Thurmond, *supra* note 29, at S4728.

article III does not specify the size of the Supreme Court, leaving open the technique of "packing" the Court that Franklin D. Roosevelt advocated—a technique widely recognized as constitutionally authorized albeit criticizable in the strongest terms as a matter of policy. Ultimately, arguments stemming from the lack of power of one branch to interfere with the "fundamental constitutional role" of another tend to be question-begging.[58] Even the proponents of the "essential" or "core" functions limitation recognize that Congress may legitimately react to constitutional rulings through the constitutional amendment route; they simply insist that that is the only legitimate route. But the question remains whether the "fundamental constitutional role" of the Court leaves any significant role for Congress under its "exceptions" power. In a sense, then, much of the debate turns on whether arguments about sensible and desirable judicial structures can be converted into constitutionally mandated ones. Much of the "essential functions" theory of Professor Ratner and Attorney General Smith strikes me as failing to heed the warning I voiced earlier about confusing wisdom and constitutionality, confusing what Congress *ought* not to do with what it *cannot* do.

Although the question of internal restraints on the "exceptions" power is hardly undebatable, ultimately I cast my lot with the range of academics who find quite unpersuasive the case for the kinds of internal restraints I have discussed. The text of article III, the *McCardle* decision, the bulk of Supreme Court dicta, congressional practice, and the constitutional scheme of checks and balances all contribute to a compelling argument that there are no substantial internal limits on Congress' article III power to limit the Court's appellate jurisdiction. For example, I believe that William Van Alstyne was correct when he said that the exceptions clause "does not know any interior restrictions. The emphasis is appropriately on the adjective 'such.' That is to say, such exceptions as Congress shall make. . . . Like the commerce power, [the 'exceptions' power] may be put to

58. For a particularly egregious variant of question-begging analyses, see R. BERGER, *supra* note 20, at 285–96. In my view, Berger's argument implicitly cast constitutional doubt even on the Court-packing plan. G. GUNTHER, *supra* note 5, at 53 n.††. A decade after publishing his 1969 thesis, Berger began to announce drastic changes in his position. He now finds congressional power to curb federal court jurisdiction very broad, on the basis of section 5 of the fourteenth amendment as well as article III. *See, e.g.*, R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982) (especially chapter 7, "Congressional Contraction of Judicial Jurisdiction," at 153-72); Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 502-27 (1983). For a full review of Berger's recent changes of position, see McAffee, *Berger v. The Supreme Court—The Implications of His Exceptions-Clause Odyssey*, 9 U. DAYTON L. REV. 219 (1984).

promiscuous and undesirable uses, but the power is there to make those damaging uses."[59] I should reiterate that, with rare exceptions,[60] the academics who endorse a broad view of the "exceptions" power strongly oppose on policy grounds the invocation of that power. Paul Bator, for example, states that a law depriving the Supreme Court of appellate jurisdiction over an important category of constitutional litigation would violate "the spirit of the Constitution," "because the structure contemplated by the instrument makes sense [only] on the premise that there would be a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law."[61] He argues that such a law would violate the "spirit" in the same sense that President Roosevelt's Court-packing scheme violated that spirit. But Bator does not deny Congress the sheer constitutional *power* to enact just such legislation.[62]

My rejection of the arguments for narrow readings of the congressional power to make "exceptions" to the Court's appellate jurisdiction should not be misread as an assertion that article III contains no

---

59. *Constitutional Restraints upon the Judiciary, supra* note 2, at 99 (statement of Van Alstyne). A number of other commentators have reached the same conclusion. Martin Redish, who also has written at length on the subject, has concluded: "[T]he 'essential functions' thesis is little more than constitutional wishful thinking . . . ." Redish, *supra* note 21, at 911. Paul Bator similarly has concluded that "[t]he arguments which would place serious limits on the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court are not . . . persuasive." *Constitutional Restraints upon the Judiciary, supra* note 2, at 55 (statement of Bator).

In the end, I continue to agree with Herbert Wechsler, my former colleague, who saw "no basis" for article III restraints on congressional exercises of its "exceptions" power, including those "motivated by hostility to the decisions of the Court." Wechsler, *The Courts and the Constitution,* 65 COLUM. L. REV. 1001, 1005 (1965). Wechsler insisted, indeed, that the arguments for internal restraints were themselves

> antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by [the supremacy clause].

Id. at 1005.

60. *See* note 66 *infra* and accompanying text.

61. Bator, *supra* note 10, at 1039.

62. *Id.* Compare Judge Robert H. Bork's testimony at his confirmation hearings: Bork would convert that "spirit" into a legally binding, "structural" interpretation of the Constitution. *Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. 6–7 (1982), *reprinted in* Baucus & Kay, *supra* note 1, at 1001–02. *But see* the position of Charles Black, the father of modern structural interpretations of the Constitution, who endorsed a very broad reading of the "exceptions" power in his Holmes Lectures. C. BLACK, DECISION ACCORDING TO LAW 37–39 (1981).

"internal" restraints whatsoever.[63] Almost every commentator acknowledges the important limit on congressional power expressed by the Court just three years after *McCardle,* in *United States v. Klein*.[64] Whether the *Klein* principle rests on the inherent quality of the "judicial Power" committed to the courts by article III or on the separation of powers principles reflected in part in article III, virtually all the commentators agree that, even if Congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases, or require a court to decide cases in disregard of the Constitution. That is a significant limitation. Indeed, some of the inartfully drawn proposals recently considered by Congress as asserted invocations of its jurisdiction-withdrawal powers are vulnerable precisely because of the *Klein* principle.[65] But that limitation does not for me cast any article III doubt on a carefully drawn statute wholly withdrawing appellate jurisdiction over an entire class of cases.

B. *Practicality and Policy*

This seems an appropriate place to say a few words about the policy considerations that make most of us who read article III as granting a very broad "exceptions" power applaud the traditional congressional forbearance in exercising that power. Only a very small number of academics encourage invocation of the power to teach the Court a lesson.[66] Most of us would strongly prefer to have Congress express its disaffection with Court rulings by initiating constitutional amendments rather than by chopping off segments of the Court's jurisdiction. Invocation of the "exceptions" power would be unseemly and chaotic and might ultimately damage relations between the Court and the political branches that have worked reasonably well in our nation's history. Moreover, as a practical matter, appellate jurisdiction-stripping laws are not truly effective means for implementing congressional dissatisfaction with Court rulings because disfavored rulings would remain on the books as influential precedents. State courts and lower federal courts in many instances would follow those prior rulings. Other courts no doubt would feel

63. Provisions outside of article III impose "external" restraints on congressional power. *See* notes 93–113 *infra* and accompanying text.

64. 80 U.S. (13 Wall.) 128 (1872).

65. *See Constitutional Restraints upon the Judiciary, supra* note 2, at 124–29 (statement of Van Alstyne).

66. *See, e.g., id.* at 152–53 (statement of Rice), 195 (statement of Gerard); *Court-Ordered School Busing, supra* note 2, at 354–57 (statement of Graglia).

freer to follow their own constitutional interpretations if the threat of appellate review and reversal were removed. All courts below the Supreme Court would have greater independence as a practical matter as the constitutional issues before them moved further and further away from the core of the existing Supreme Court holdings. The result would be differing interpretations of constitutional norms among the various courts, which would subvert the value of uniformity that Supreme Court review now tends to assure. Although the uniformity-assuring function of the Court does not strike me as a constitutionally mandated one, as a matter of policy, our system—any system—would be poorer and less coherent in the absence of a single, ultimately authoritative court at the apex of the judicial hierarchy.

These potential consequences of curtailment of appellate jurisdiction have no doubt helped inhibit Congress from resorting to its "exceptions" power. But they do not demonstrate that dubious constitutional interpretations are warranted to justify article III restraints on that power. To the contrary, respectable academics have argued that the existence of the congressional power, albeit not its frequent exercise, ultimately undergirds the health of the system. Thus, the brilliant Hart and Wechsler work on federal jurisdiction suggests that it may be "politically healthy" that "the limits of Congressional power have never been completely clarified"[67]: "In some circumstances, may not attempts to restrict jurisdiction be an appropriate and important way for the political branches to register disagreement with the Court . . . ?"[68] Charles Black has argued that the existence of congressional power over federal court jurisdiction (and the traditional forbearance of Congress in using it) is "the rock on which rests the legitimacy of the judicial work in a democracy."[69] I find much that is persuasive in these views of our senior constitu-

67. HART & WECHSLER, *supra* note 49, at 363; *see also* Gunther, *Congressional Responses to Supreme Court Decisions: Distinguishing Constitutionality and Wisdom,* 18 STAN. LAW. 24 (1983) ("[W]hen the judiciary survives the recurrent firestorms of criticism because Congress is persuaded not to resort to [its] weapons except under the most extreme circumstances, the system works at its best and the stature of the Court often emerges all the greater.").

68. HART & WECHSLER, *supra* note 49, at 363.

69. Black, *The Presidency and Congress,* 32 WASH. & LEE L. REV. 841, 846 (1975); *see also* Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review,* 34 WASH. & LEE L. REV. 1043, 1048 (1977). Black elaborates his observation at considerable length in his Holmes Lectures. *See* C. BLACK, *supra* note 62.

Michael Perry, in his recent book, *The Constitution, the Courts, and Human Rights,* quotes Black at length. *See, e.g.,* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 128–29 (1982). Perry's own very unusual position suggests limited agreement with Black: Perry argues that congressional power to curb jurisdiction only extends to "noninter-

tional scholars, and I think they are well worth bearing in mind even as we condemn particular proposals pending in Congress and even while some of us continue to seek constitutional restraints on congressional authority over appellate jurisdiction.

C. *The "Inferior" Courts*

There have been far fewer attempts to articulate internal restraints on federal power to curtail the jurisdiction of the lower federal courts. A case for such restraints faces even greater obstacles in the constitutional language than the case for restrictions on appellate jurisdiction. It is certainly difficult to argue that lower federal courts *must* be available to adjudicate federal claims when the explicit language of article III, and the central point of the Constitutional Convention's compromise, was to leave the establishment of lower federal tribunals to the discretion of Congress. Paul Bator has put forth with special force the widely supported conclusion: "The Constitution contains many provisions that are not at all clear. It does, however, contain a few that are clear. One of the clearest is the power of Congress to regulate the jurisdiction of [the lower federal courts]."[70] As Bator states, the congressional power to "pick and choose" the classes of cases to be litigated in the lower federal courts is not primarily a mechanical inference from any notion that "the greater power (not to create such courts at all) must include the lesser (to create them but limit their jurisdiction)."[71] Rather, it is the Convention compromise itself that warrants that conclusion. The essence of that compromise

> was an agreement that the question whether access to the lower federal courts was necessary to assure the effectiveness of federal law should not be answered as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment . . . . It would make nonsense of that notion to hold that the only power to be exercised is the all-or-nothing power to decide whether *none* or *all* of the cases to which the federal judicial power extends need the haven of a lower federal court.[72]

---

pretive" rulings of the Court, not to rulings that reflect the Court's reading of the Framers' value judgments. *See id.* at 129–30.

70. Bator, *supra* note 10, at 1030.

71. *Id.* at 1031.

72. *Id.* Note that Attorney General Smith, who advocated a substantial "core functions" restraint on congressional power over the Supreme Court's appellate jurisdiction in his May 6, 1982, letter to Senator Thurmond, *supra* note 29, took a very broad view of congressional authority regarding the lower federal courts in a letter of the same date to Congressman Peter Rodino, the Chairman of the House Judiciary Committee. *See* Letter from

A broad congressional power over the jurisdiction of the lower federal courts is supported, moreover, by a long line of decisions and by repeated practice. Although Congress did set up lower federal courts (with quite limited jurisdiction) as early as the 1789 Judiciary Act, it did not grant them general federal question jurisdiction until after the Civil War.[73] And Congress has repeatedly, and successfully, withdrawn previously granted jurisdiction because of dissatisfaction with the performance of the federal courts and in the belief that state courts were the more appropriate tribunals of original jurisdiction in certain types of cases. The Norris-LaGuardia Act of 1932,[74] the Johnson Act of 1934,[75] and the Tax Injunction Act of 1937[76] are obvious examples.[77] Bator, who finds the congressional power over the Supreme Court's appellate jurisdiction a troublesome offense to the "spirit" of the Constitution,[78] has no such qualms about the power regarding lower courts:

> If the Congress decides that a certain category of case arising under federal law should be litigated in a state court, subject to Supreme Court review, *neither the letter nor the spirit of the Constitution has been violated.* What has happened is that Congress has taken up one of the precise options which the Constitutional Framers specifically envisaged. From the viewpoint of the Constitution, nothing has gone awry.[79]

I have quoted at some length from Paul Bator's work because his position is a widely held one. There have been very few academics who have suggested that there are substantial internal restraints (apart from those arising from the *Klein* principle noted earlier[80]) on congressional authority over lower federal courts. One of the rare articulations of suggested limits was put forth a few years ago by Theodore Eisenberg. He relied heavily on the changing role and

---

Attorney General William French Smith to Congressman Peter Rodino (May 6, 1982), *reprinted in Hearings on S. 951 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 97th Cong., 2d Sess. 308–23 (1982). The Attorney General's letter to Congressman Rodino was prompted by Senator Johnston's anti-busing proposal. *See also* G. GUNTHER & F. SCHAUER, 1983 SUPPLEMENT TO G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW—TENTH EDITION 4-5, 175-77 (1983).

73. *See* Judiciary Act of 1875, 18 Stat. 470 (1875) (current version at 28 U.S.C. § 1331 (1976)).

74. Ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–10, 113-115 (1976)).

75. Ch. 283, 48 Stat. 775 (1934) (current version at 28 U.S.C. § 1342 (1976)).

76. Ch. 726, 50 Stat. 738 (1937) (current version at 28 U.S.C. § 1341 (1976)).

77. Bator, *supra* note 10, at 1032.

78. *Id.* at 1039.

79. *Id.* at 1034 (emphasis in original).

80. *See* notes 64–65 *supra* and accompanying text.

growing importance of lower federal courts over the centuries rather than on the text or the Framers' intent, concluding: "It can now be asserted that [the existence of lower federal courts] in some form is constitutionally required."[81] He emphasized the need to have lower federal courts to assure enforcement of "innovative" Supreme Court decisions in areas such as reapportionment and desegregation, and the impossibility, given the modern Court's workload, of Court review of all state court cases involving federal issues.[82] Eisenberg's position, however, is ultimately unpersuasive. Changed circumstances cannot overcome the unambiguous language of article III or the clearly expressed intent of the Framers to give Congress broad discretion over lower federal court jurisdiction.[83]

D. *Denying Access to All Federal Courts*

Is there a stronger case for internal restraints when Congress seeks to block the jurisdiction of *all* federal courts—the Supreme Court as well as the lower courts—in a specified class of cases? That is the form of a fair number of modern jurisdiction-stripping proposals, including Senator Helms' "voluntary prayer" bills.[84] Those who read the exceptions clause broadly with respect to the Supreme Court and who accept the widely held view about broad congressional control of lower federal court jurisdiction find it hard to see anything in article III that would bar congressional action, as a matter of sheer constitutional power, to remand federal constitutional issues for final state court adjudication. Such a scheme seems consistent with the constitutional language and the Framers' intent, especially because state courts, at the outset and for decades after, were envisioned as not only the competent enforcers but indeed the primary enforcers of federal law.

Lawrence Sager recently has offered the novel argument that article III requires that there must be *some* federal judicial forum for the enforcement of federal constitutional rights—either a lower federal court or the Supreme Court.[85] Sager relies primarily on the

---

81. Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 513 (1974).

82. *Id.* at 512–13.

83. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 24 (1980); Redish & Woods, *Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 67–75 (1975).

84. *See* note 2 *supra*.

85. Sager, *supra* note 3, at 61–68. Sager's position has some similarity in result to Justice Story's 1816 dicta in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337–42 (1816).

guarantees of federal judicial independence in article III—the tenure and salary provisions governing federal judges. Reading these provisions in the context of the entire article, and noting that many state judges are not afforded similar protections, he argues that some article III forum is constitutionally mandated for the ultimate enforcement of federal constitutional rights. In his view, it follows that Congress may bar *either* Supreme Court *or* lower federal court reexamination of state adjudications of federal constitutional issues, but *not* both. Redish quite properly counters that Sager "effectively adopts a 'floating' essential functions thesis."[86] Moreover, Redish argues at length (persuasively, in my view) that the tenure and salary provisions relied on by Sager were simply designed "to preserve the integrity of the federal courts when they actually were used," not to assure that they *must* be used.[87]

Redish goes on to suggest that a variant of Sager's contention might be more persuasive if it rested not on article III itself but on one of the "external" restraints, the due process clause of the fifth amendment.[88] It is widely agreed that due process does assure access to some judicial forum in many circumstances. Traditionally, however, due process has not been thought to require access to a *federal* judicial forum. As Henry Hart put it a generation ago, "[i]n the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."[89] Redish, admirably wary of pushing arguments based on desirability beyond the limits imposed by "adherence to a principled interpretation of the Constitution,"[90] suggests rather hesitantly that the due process requirement might be read as demanding an *independent* judicial forum, and that some of Sager's arguments might be used to show that state courts do not satisfy such a due process requirement because many of them lack the kinds of independence safeguards provided for federal judges by article III.[91] In my view, Redish's due process alternative to Sager's thesis ultimately fails because of the same flaw Redish finds in Sager: "Unless we are able to find objective criteria, grounded in the Constitution, by which to declare state courts technically inadequate forums for the adjudication of constitutional rights, we cannot—as a constitutional matter, at

86. Redish, *supra* note 3, at 145.
87. *Id.* at 151–52.
88. *Id.* at 161–66.
89. Hart, *supra* note 22, at 1401.
90. Redish, *supra* note 3, at 166.
91. *Id.* at 164–66.

least—reject the long-accepted history recognizing the competence of state courts to perform this function."[92]

IV. "EXTERNAL" RESTRAINTS: LIMITS ON CONGRESSIONAL POWER BASED ON PROVISIONS OTHER THAN ARTICLE III

Given the textual and historical difficulties in establishing "internal" restraints, it is no surprise that recent efforts to articulate constitutional limits on congressional power to curb federal court jurisdiction increasingly rely on "external" restraints. As Redish's effort to recast Sager's article III argument into a due process limitation illustrates, more and more of the modern commentary has turned to the constitutional guarantees of individual rights, particularly those in the Bill of Rights, as promising sources of restraints on congressional power over jurisdiction. This tendency is understandable in light of the expansive interpretations of due process and equal protection by the Warren and Burger Courts and the modern Court's interpretation of the fifth amendment's due process clause to include an equal protection guarantee.

Scholars agree that the Bill of Rights applies to all areas of congressional action, and that some jurisdictional restraints would indeed be vulnerable to fifth amendment attack. For example, given the core function of the equal protection clause as a ban on racial discrimination and the due process barrier to wholly arbitrary legislation, academics probably would agree that Congress could not limit access to the federal courts on the basis of race or of wholly irrelevant criteria such as a litigant's height, weight, or hair color.[93] The battlefield lies beyond that common ground. To what extent can all the modern apparatus of strict judicial scrutiny for fundamental constitutional rights be invoked to curtail Congress' broad litigation-channelling authority, an authority that Congress seems to have under article III's text, history, and practice? In the remainder of this essay, I will sketch the underlying themes and arguable flaws of the modern "external" restraints theses.

The most commonly voiced external restraint in the modern literature, articulated in seemingly infinite variations and permutations,[94] seems to me to boil down to essentially this: most agree that

92. *Id.* at 166.

93. *See, e.g., Constitutional Restraints upon the Judiciary, supra* note 2, at 45 (statement of Bator), 132 (statement of Van Alstyne); *see also* Bator, *supra* note 10, at 1034.

94. *See, e.g.,* Sager, *supra* note 3, at 26, 70; Tribe, *supra* note 3, at 144–49. Sager, in

legislation singling out particular classes of *litigants* on the basis of their race or other "suspect" classifications, or impeding their exercise of fundamental federal rights, triggers a strict scrutiny inquiry. In effect, such legislation is presumptively invalid, and may be justified only after meeting a virtually impossible test: the legislation must serve a compelling governmental interest and utilize the least burdensome means to achieve that interest.[95] Hence, the argument goes, singling out classes of *issues* for primary or exclusive adjudication in state rather than federal courts should trigger similar strict scrutiny.

Laurence Tribe has refined the argument by relying primarily on the *Hunter v. Erickson* line of modern cases.[96] In *Hunter* itself, the Court struck down a city charter amendment that mandated a voters' referendum before any ordinance concerning racial, religious, or ancestral discrimination could become effective. The city council was authorized to act without such referenda in other areas of its authority.

The central question raised by invocations, such as Tribe's, of the equal protection-strict scrutiny lines of cases is whether they condemn congressional jurisdiction-channelling laws that prescribe primary reliance on state courts for some subjects of federal question litigation and allow access to federal courts for others. Tribe condemns such channelling schemes as forbidden "jurisdictional gerrymandering."[97] For most claims (and claimants), he notes, jurisdictional laws afford a two-track option—suits can be brought in either state or federal court; but if the jurisdiction-stripping bills are enacted, only a single, state court option for a special subset of claims

---

addition to resting his argument on the salary and tenure provisions of article III, *see* text accompanying notes 85–87 *supra,* claims that "Congress' authority to shape federal jurisdiction cannot extend to shaving off discrete and disfavored constitutional claims with deep prejudice to judicially protected rights." Sager, *supra* note 3, at 70. *But see* Redish, *supra* note 3, at 154–57 (responding to this aspect of Sager's thesis). And note the position of Leonard Ratner, the leading modern advocate of internal restraints:

> [R]emoval of school prayer cases from the Supreme Court's appellate jurisdiction, *if otherwise authorized by the exceptions and regulations clause,* would not violate equal protection, because the purpose, not achievable by a less intrusive alternative, would then be the constitutionally approved and necessarily "compelling" one of checking congressionally disapproved Supreme Court doctrine.

Ratner, *Majoritarian Constraints, supra* note 25, at 954 (emphasis in original).

95. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

96. 393 U.S. 385 (1969); *see also* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982).

97. *See Proceedings, supra* note 3, at 273 (statement of Tribe); Tribe, *supra* note 3.

(and claimants) would remain available. That kind of two-track scheme, he insists, is forbidden under *Hunter v. Erickson* and general equal protection principles.

This is not a frivolous argument, but I do not think it is in the end persuasive. Rather, it strikes me as ultimately circular and question-begging. The central problem is that it too readily extends the analysis of the obvious flaw in laws that distinguish among *litigants* on the basis of race or other forbidden criteria to jurisdictional statutes that differentiate on the basis of *subject matter*. The basic difficulty with this is that no principle requires that all classes of federal question litigation be handled in the same way. If one accepts that the article III compromise gave Congress the power to decide how to channel federal issues as between federal and state courts, assigning some classes of cases to the state courts does not "discriminate against," or "burden," or "prejudice" the rights involved in those cases.[98] On their face at least, properly drafted jurisdiction-channelling bills do not distinguish between litigants or on the basis of particular outcomes but rather on the basis of the types of issues raised.[99]

The underlying assumption that relegation of a federal claim to the state court system invariably produces less vigorous enforcement of the federal right—a central premise of all external restraints arguments against subject matter curtailments of federal jurisdiction—is itself suspect. Not only does that assumption fly in the face of the original understanding (which viewed the state courts as ordinarily appropriate enforcers of federal law); it also is a questionable generalization today. The Supreme Court of California, for example, whatever its flaws, frequently has been a step ahead of the United States Supreme Court in "liberal," "progressive" interpretations of federal constitutional rights, in the Warren era as well as the Burger

98. "Discriminate" is the term usually associated with equal protection challenges; "burden" is the term associated with challenges resting on interference with "fundamental" constitutional rights such as those under the first amendment and those that have evolved in substantive due process adjudications. "Prejudice" is the term invoked in Sager, *supra* note 3, at 70.

99. For an especially ingenious, albeit tortured and ultimately unpersuasive, variant on modern external restraints contentions, see Brilmeyer & Underhill, *supra* note 3. The authors rely not on fourteenth amendment restraints but on conflict of laws principles to develop an "equal access" principle. They conclude that, "to the extent Congress does leave federal question jurisdiction intact, it may not deny constitutional claims equal access to federal courts." *Id.* at 849. Note that this thesis stems in part from a recognition of the "serious defect" in the usual arguments against "congressional gerrymandering of disfavored constitutional rights." *Id.* at 848. The "defect" they identify is that the "anti-gerrymandering" arguments "reduce the congressional role to triviality and thus interpret the regulations and exceptions clause and the power to create lower federal courts into absurdity." *Id.*

one.[100] This can be said of other state courts as well. Assigning some federal claims to state courts admittedly will produce some nonuniformity, but nonuniformity does not inevitably denigrate federal claims.

In short, most of the variations on this type of equal protection argument fail because they do not allow the exercise of congressional judgment that seems authorized by article III—to decide from time to time that certain classes of cases will receive more understanding or more useful treatment by being handled by state rather than federal courts (or vice versa).[101] Congress made this type of judgment during the New Deal, for example, with respect to federal injunctions against state taxes.[102] This kind of judgment has lain unquestionably within congressional power throughout our history, yet it presumably would be illegitimate under some of the recent equal protection contentions.[103]

One possible objection to my position is that it overlooks the obvious motivation of the members of Congress who introduce jurisdiction-stripping proposals: to "get at" the Supreme Court, to express hostility to Supreme Court decisions, to provide a less interventionist forum for the adjudication of federal claims. In my view, fatal flaws exist in the frequently made argument that the Court should strike down jurisdiction-stripping laws because of such allegedly improper "motivation."[104] All recognize the difficulty of proving legislative motive, and the Court has expressed a reluctance (in the *McCardle* case, for example) to venture into that terrain.[105] Still, the Court does not always shy away from motive inquiries.[106] The deeper issue is whether Congress acts with unconstitutional motive when it redraws jurisdictional lines in part because it dislikes certain federal

100. *See, e.g.,* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *see also* G. GUNTHER, *supra* note 5, at 67; Note, *supra* note 48.

101. *See* Redish, *supra* note 21, at 909–15; *see also Constitutional Restraints upon the Judiciary, supra* note 2, at 131 (statement of Van Alstyne); Bator *supra* note 10, at 1034–38.

102. Tax Injunction Act of 1937, ch. 726, 50 Stat. 738 (current version at 28 U.S.C. § 1341 (1976)); *see also* Johnson Act of 1934, ch. 283, 48 Stat. 775 (current version at 28 U.S.C. § 1342 (1976)); Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–110, 113–115 (1976)).

103. *See Proceedings, supra* note 3, at 275–80 (statement of Van Alstyne).

104. Even Laurence Tribe, the advocate of the "jurisdictional gerrymandering" thesis, does not rely on a "motivation" attack. *See id.* at 269, 273 (statement of Tribe).

105. 74 U.S. (7 Wall.) 506, 514 (1869); *see also* Palmer v. Thompson, 403 U.S. 217, 224–25 (1971); United States v. O'Brien, 391 U.S. 367, 382–86 (1968).

106. *See, e.g.,* Washington v. Davis, 426 U.S. 229 (1976); *see also* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205 (1970).

court decisions. Assertions that such a motive is unconstitutional rest, once again, on circular, question-begging reasoning. As William Van Alstyne has put it, all that may be said about the challenged laws is that

> Congress has expressed its sense of disaffection to the manner in which the United States Supreme Court has ruled with regard to [a certain] category of cases. It is a different question as to whether the invisible radiation of the implied equal protection clause [of] the Fifth Amendment forbids Congress to use its power under Article III, the exceptions clause, as an appropriate vehicle to express disaffection for results reached in that way. It begs a crucial question.
>
> The crucial question is whether or not Article III is compatible with the Fifth Amendment in regard to the power of Congress to express such disaffection.[107]

In short, the issue comes back to whether or not article III grants a very broad discretion to Congress in assigning federal question litigation to state or federal courts. In my view, the basic structure of article III affords precisely that power to Congress, and that power may even be exercised, as Herbert Wechsler argued years ago, to express disaffection with Court decisions.[108] In doing so, Congress merely relies on the state courts to enforce federal rights, part of their traditional, originally contemplated role and one that they often have handled with independence, quite contrary to the result hoped for by the sponsors of jurisdiction-stripping bills. Moreover, disaffection-based jurisdictional statutes have been sustained in the past. The Tax Injunction Act and the Norris-LaGuardia Act, for example, evolved from disagreements with the way federal courts handled state tax and labor injunction cases, not merely from an abstract preference to have the law in those areas developed by state tribunals. The Supreme Court found no constitutional flaws with those congressional devices.[109]

In the end, then, I am not persuaded by those advocating attacks on improper congressional motivations, even though those advocates have been numerous and vocal in the recent legislative hearings on jurisdiction-curbing proposals.[110] On this issue, I have no difficulty endorsing a position voiced some years ago by my colleague Paul Brest, who urged the "conscientious legislator" not to vote for a law if

---

107. *Proceedings, supra* note 3, at 278 (statement of Van Alstyne).
108. *See* Wechsler, *supra* note 59, at 1005.
109. *See, e.g.*, Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938) (Norris-LaGuardia Act).
110. *See generally Constitutional Restraints upon the Judiciary, supra* note 2.

the lawmaker in fact has forbidden—e.g., racist—motives in mind.[111] Indeed, I would urge the conscientious legislator to vote against the recent jurisdiction-stripping devices because they are unwise and violate the "spirit" of the Constitution, even though they are, in my view, within the sheer legal authority of Congress. But I part ways from another colleague, John Hart Ely, who finds the motivation route a fruitful one for judicial invalidation in this area.[112] In sum, I doubt the usefulness and validity of motivation arguments in any legal challenge to properly drafted jurisdiction-curbing bills.[113]

I believe, then, that the recent external limit contentions are not persuasive beyond the agreed-upon unconstitutionality of racially (and otherwise arbitrarily) discriminatory devices. But I should warn in closing that my skepticism about the textual, historical, and principled bases of most arguments for internal and external limitations should not be read to imply that the Supreme Court today

---

111. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation,* 27 STAN. L. REV. 585, 592–94 (1975); *cf. The Human Life Bill, Appendix: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. 879–81 (1981) (letter of Thomas Grey and Paul Brest).

112. Ely, *supra* note 106, at 1306–08.

113. In my overview of modern external restraints, I have not given separate attention to the argument that Congress may not, under the guise of jurisdictional legislation or any other, cut off *all* remedies for the enforcement of federal constitutional rights. I have not explored this issue in full because to a large extent it raises separable questions pertaining to the controverted area of congressional power under section 5 of the fourteenth amendment. *See generally* Katzenbach v. Morgan, 384 U.S. 641 (1966); G. GUNTHER, *supra* note 5, at 1086–1104; Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603 (1975). But at least this much may be said in brief: all agree that Congress cannot bar all remedies for enforcing federal constitutional rights. The difficulty lies with the relevance rather than the acceptability of that principle. The principle simply does not cast substantial doubt on the validity of the jurisdiction-curbing schemes considered in the text of this essay. To cut off the jurisdiction of some or all federal courts over specified classes of cases is *not* to cut off *all* remedies, given the existence of state courts and their traditionally assumed competence and indeed constitutional obligation to enforce federal rights. In short, the argument that curbing federal jurisdiction denies *all* remedies rests on a questionable assumption about the "inherent inadequacy of the state courts." *See* Redish, *supra* note 3, at 157; notes 98–103 *supra* and accompanying text.

A more difficult problem arises when Congress, relying not only on article III but also on Congress' "remedial" power under section 5 of the fourteenth amendment, seeks substantially to alter remedies for the enforcement of federal constitutional rights. Recent controversies over anti-busing proposals, especially Senator Johnston's Neighborhood School Act of 1982, S. 951, 97th Cong., 1st Sess., 128 CONG. REC. S1336-37 (daily ed. Mar. 2, 1982) (adopted by the Senate in March 1982), present this problem. The central question raised by such proposals is "the extent to which particular busing remedies, as distinct from merely being appropriate and within the discretion of federal courts of equity, are constitutionally indispensable." *Proceedings, supra* note 3, at 289 (statement of Van Alstyne). That question is of course a debatable one. *See, e.g., id.* at 271 (statement of Tribe); *see also* Letter from Attorney General William French Smith to Congressman Peter Rodino, *supra* note 72.

would sustain jurisdiction-stripping laws. I have simply tried to delineate and evaluate some of the arguments that recur in the ongoing debate; I have not tried to predict what the Supreme Court would do. The Justices no doubt view the pending jurisdiction-curbing bills with something less than enthusiasm, and their sense of institutional self-defense may ultimately tempt them to adopt some of the limits that have been articulated in the recent literature. It would not be the first time that a Justice inclined to take a particular road as a matter of institutional self-interest found aid and comfort for doing so in the academic literature.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 7, 1982

MEMORANDUM FOR THE FILE

FROM: JOHN G. ROBERTS JGR

SUBJECT: Judicial Nominees/Geoffrey Alprin and Virginia Riley

On December 6, 1982, Senator Eagleton and Senator Mathias reviewed the FBI files on Geoffrey Alprin and Virginia Riley in my presence. Mr. Alprin and Ms. Riley have been nominated for the D.C. Superior Court.

Senator Eagleton reviewed the Alprin file and asked if there was anything negative in it. I responded that there was not. He stated that he knew two of the references interviewed in Alprin's case and would take their word on him. Senator Eagleton then reviewed the Riley file, and concluded that "there's nothing unusual there."

Senator Mathias reviewed the Alprin file, noted that Alprin had received "nothing but rave reviews," and asked if there was anything negative in the file. I responded that there was not, and the Senator then turned to the Riley file. He reviewed it briefly, repeated his question, and received the same reply.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 21, 1982

NOTE TO: JOHN ROBERTS
OFFICE OF THE WHITE HOUSE COUNSEL

FROM: DAVID GERSON
ASSOCIATE DIRECTOR

SUBJECT: PAY RAISE FOR JUDGES

I am advised that judicial salaries have been increased as of December 18 according to the following schedule:

Chief Justice.....	96,800	100,700
Associate Justice.....	93,000	96,700
Circuit Judges.....	74,300	77,300
District Judges.....	70,300	73,100
Court of International Trade...	70,300	73,100
Court of Claims.....	57,500	65,200
Bankruptcy (Full-time).....	58,500	63,600
Bankruptcy (Part-time).....	30,600	31,800

The relevant section of the Continuing Resolution is attached for your information. Please call if you have any further questions.

Sec. 128. (a) Section 101(e) of Public Law 97-276 is amended by striking out "December 17, 1982," and inserting "September 30, 1983,".

(b) In lieu of payment of salary increases of up to 27.2 percent as authorized by law for senior executive, judicial, and legislative positions (including Members of Congress), it is the purpose of this section to limit such increases to 15 percent. Notwithstanding the provisions of section 306 of S. 2939 made applicable by subsection (a) of this section, nothing in subsection (a) shall (or be construed to) require that the rate of salary or pay payable to any individual for or on account of services performed after December 17, 1982, be limited to an amount less than the rate (or maximum rate, if higher) of salary or pay payable as of such date for the position involved increased by 15 percent and rounded in accordance with section 5318 of title 5, United States Code.

(c) Subsection (b) shall not apply to Senators.

(d) For the purposes of any rule, regulation, or order having the force and effect of law and limiting the annual rates of compensation of officers and employees of the Senate by reference to the annual rate of pay of Senators, the annual rate of pay of Senators shall be deemed to be the annual rate of pay that would be payable to Senators without regard to subsection (c) of this section.

Sec. 129. Notwithstanding any other provision of this joint resolution, there is appropriated to the "Federal Labor Relations Authority", $15,500,000.